Supreme Court of the United States

OCTOBER TERM, 1940.

No.....

DEN NORSKE AMERIKALINJE A/S, as claimant of the steamship IDEFJORD, her engines, etc.,

Petitioner,

against

BLUMENTHAL IMPORT CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The essential facts are stated in the petition. For a fuller statement the Court is referred to the findings of fact made by the District Court (R. pp. 282-288). See, too, the opinion of the Circuit Court of Appeals (R. pp. 306-308).

FIRST POINT

The decision below is in conflict with that of the Circuit Court of Appeals for the Third Circuit in *The St. Hubert*, 107 Fed. 727, certiorari denied 181 U. S. 621, and with many other well considered decisions.

1. *The decision in The St. Hubert.*

In *The St. Hubert, supra,* Stanley & Co. of Calcutta, acting as agents of Cooper, Smith & Co. of Philadelphia,

shipped to the latter sixty-five bales of goat skins in two lots, on board two steamers, the Palawan and the City of Sparta. The bills of lading issued at Calcutta by the owners of the two vessels are thus described by the Circuit Court of Appeals (107 Fed. at p. 728):

> "The bills of lading given by the owners of the Palawan and Sparta were through bills of lading from Calcutta to Philadelphia; that of the Palawan stating that the skins were to be carried via London, with a stipulation that 'the company are to be at liberty to carry the said goods to the port of their destination by the above or other steamer or steamers, ship or ships, either belonging to the company or to other persons.' The bill of lading for the skins shipped by the Sparta is also a through bill of lading from Calcutta to Philadelphia, but states that the ship is bound for London via Suez Canal, and that the goods are 'to be transshipped or landed at London, with liberty to warehouse there, and from London to be forwarded by steamer, at the risk of the shipper, but at ship's expense, and to be delivered subject to the exceptions and conditions at foot hereof.' It also has a general stipulation similar to that of the Palawan,—that the 'owners are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers, ship or ships, either belonging to the owners or other persons, * * * and to transship * * * the goods, either on shore or afloat, and reship and forward the same, at owner's expense, but at merchant's risk.' Upon this bill of lading of the Sparta there is also the following note: 'The goods to be carried to Philadelphia, subject to the terms and conditions of local bills of lading issued by the agents of such steamer or steamers.'"

When the goods arrived at London they were transshipped on the steamship St. Hubert, to be carried from London to Philadelphia. The goods were received by the St. Hubert pursuant to the terms of its own bill of lading which contained a provision not in the bills of lading issued

at Calcutta providing that the shipowner was not to be liable:

> "* * * for any claim, notice of which is not given before the removal of the goods" (p. 729).

The St. Hubert reached Philadelphia in due course and the goods were delivered to Cooper, Smith & Co., who did not give notice of claim before they removed the goods. A suit to recover for the damage sustained by the goods was later brought *in rem* against the St. Hubert. The Circuit Court of Appeals for the Third Circuit held that the St. Hubert could be made liable only in accordance with the contract under which it had accepted the goods and that the failure to give notice of claim before the goods were removed barred the suit. In addition to the extracts from the opinion quoted *supra*, pages 6, 7, the Circuit Court of Appeals for the Third Circuit further said (p. 732):

> "The new carrier receipted for the goods from the old, and delivered to them its bills of lading, which were the measure of its responsibility, and the terms of which were binding upon it, as an obligation of its own contract freely entered into. There is in these bills of lading a single reference to the through bills of lading issued by the owners of the Palawan and Sparta, in Calcutta, and that is the convenient and usual one in cases of transshipment that the delivery of the goods is to be made to the party or parties who appear to be consignees of the through bills of lading, properly indorsed. But this is an express term and stipulation of the particular bills of lading issued by the new carrier. The terms upon which the service was to be performed depended upon the consent of the new carrier as embodied in the agreement of its bills of lading. It assumed no duty or obligation towards the consignees, other than as stated and limited therein. The original carriers were obliged to make the best bargain they could for the continuance of the carriage service they had undertaken for the owners and consignees."

In concluding its opinion the Circuit Court of Appeals for the Third Circuit further stated (p. 733):

> "The liability of the last carrier to the owners of the goods it had undertaken to carry, whether that liability rested on contract or in tort, must be taken to be limited by the express stipulation contained in its individual contract of service."

The Circuit Court of Appeals for the Third Circuit further pointed out that a provision in the bill of lading for the Sparta, that the goods were to be carried "subject to the terms and conditions of local bills of lading," removed "all ground for controversy as to the 25 bales of skins received from that ship" (p. 733). While the bill of lading of the Palawan contained no such provision, the Circuit Court of Appeals held that the same rule applied.

2. *Other decisions in accord with the St. Hubert.*

In *Crossan* v. *New York & New England R. R. Co.*, 149 Mass. 196 (1889), the defendant, an independent auxiliary carrier, had notice from the way-bill that freight had been fully prepaid to the initial carrier. Nevertheless it received a shipment of horses and transported them to destination, where it refused to deliver them unless paid the freight due on its own line. The owner of the horses brought suit for conversion, arguing that the initial carrier was a special agent and that the defendant had notice that the initial carrier had no authority to create an additional charge on the goods. In deciding in favor of the defendant, Mr. Justice Holmes, at that time on the Massachusetts bench, said (pp. 198-199):

> "An unforeseen case had arisen, and the defendant was called on by the plaintiff's forwarding agent to act at once in some way. * * * The plaintiff was not present, and it might take time and cost money to communicate with him; the horses were perishable, and their keep would probably have cost more than the unpaid freight if they had been delayed;

> although we do not now decide whether these last facts make a difference in the law.
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> "If the effect of the plaintiff's instructions were doubtful, the law would give the defendant the benefit of the interpretation adopted by it in good faith (*Ireland* v. *Livingston*, L. R. 5 H. L. 395, 416), and would consider the necessity of an immediate decision. *Hawks* v. *Locke*, 139 Mass. 205, 209."

In concluding the opinion on this point Mr. Justice Holmes said (p. 199):

> "It is to be observed that the principle that no man's property can be taken from him without his consent, express or implied, has not prevented the last of a line of carriers from maintaining its lien when the first carrier has forwarded the goods to a wrong place. *Briggs* v. *Boston & Lowell Railroad*, 6 Allen 246, distinguishing *Robinson* v. *Baker*, 5 Cush. 137. *Whitney* v. *Beckford*, 105 Mass. 267. *Patten* v. *Union Pacific Railway*, 29 Fed. Rep. 598, disapproving *Fitch* v. *Newberry*, 1 Doug. (Mich.) 1; *Vaughan* v. *Providence & Worcester Railroad*, 13 R. I. 578. Yet in that case the last carrier might be said to have notice that the forwarding agent's authority was limited to sending the goods to the place directed by the shipper."

In addition to the authorities cited in the preceding paragraph, reference may be made to Volume 13, C. J. S., p. 913; *Crane* v. *Tooker Storage & Forwarding Co.*, 204 Ill. App. 354; *Hall Corp.* v. *Cargo ex s/s Mont Louis*, 62 Fed. (2d) 603, 605 (C. C. A. 2), and the numerous decisions holding that the owner of goods is bound by a contract of carriage restricting the carrier's liability, although the agent was without authority to enter into such a contract and that lack of authority was ascertainable by the carrier.

Reid v. *Fargo*, 241 U. S. 544;
Nelson v. *Hudson River R. R. Co.*, 48 N. Y. 498;
Miller v. *Harvey*, 221 N. Y. 54, 57, per Mr. Justice Cardozo.

The Cayo Mambi, 1 Fed. Supp. 118, aff'd 62 Fed. (2d) 791 (C. C. A. 2), also follows *The St. Hubert, supra,* and supports the petitioner. In that case the bill of lading issued by the initial carrier fixed the value of the packages received at not to exceed £100 per package. Transshipment was effected at New York, the bill of lading of the independent auxiliary carrier restricting the amount recoverable to $100 per package. The goods were damaged while in the possession of the independent auxiliary carrier, which thereupon paid the goods owner the amount of the claim up to $100 per package. The goods owner was held entitled to recover from the initial carrier the balance of damages outstanding, on the theory that the initial carrier had by the forwarding contract restricted the claim of the goods owner against the independent auxiliary carrier, and that this restriction was valid insofar as the independent auxiliary carrier was concerned.

3. *The decision of the Circuit Court of Appeals in the case at bar.*

The Idefjord, an "independent auxiliary carrier," was free to accept the goods on its own conditions, if we assume, as we should, that *The St. Hubert, supra,* was correctly decided.

The Circuit Court of Appeals for the Second Circuit, however, denied the validity of that fundamental proposition, saying (R., bottom of p. 312):

> "* * * the Idefjord, by accepting the cargo for carriage with knowledge of the clean through bills, made the issuer of those bills its agent. It could not then accept the goods under its own conditions * * *."

If the Idefjord "made the issuer of those (Alexandria) bills of lading its agent," it could not escape liability in the present suit; by parity of reasoning, the St. Hubert made the issuer of the Calcutta bills of lading its agent, and that case was wrongly decided.

The above surprising proposition of the Circuit Court of Appeals for the Second Circuit is contrary to other authorities. In *Scrutton on Charter Parties and Bills of Lading,* 14th Ed. (1939), the legal principle is stated as follows (p. 84):

> "*Semble,* that the companies other than the company which signs and delivers the bill of lading, are not liable and cannot sue on the contract of carriage contained in such bill of lading, unless the signing company had authority to act in their behalf, or its action was afterwards ratified by them."

In the case at bar D. C. Pitellos & Co., who signed the Alexandria bills of lading, had no authority to act on behalf of the Idefjord. Nor were the Alexandria bills of lading ratified by or on behalf of the Idefjord, which accepted the goods under and subject to its own terms and conditions.

There are some subsidiary points in the opinion of the Circuit Court of Appeals which may be briefly referred to:

It is said (R. p. 311) that there is no provision in the Alexandria bills of lading which authorized shipment on deck from Port Said. The Alexandria bills of lading, however, provided, as quoted by the Circuit Court of Appeals (R. p. 310), that the goods were to be transshipped "subject to the conditions and exceptions of the carrying conveyance."

It was a necessary condition that the goods should be carried for a part of the way on deck, because there was no room below deck. It was unnecessary that the Alexandria bills of lading specify in detail all the conditions that an independent auxiliary carrier might have to insist upon.

Moreover, these Alexandria bills of lading gave the carrier the liberty "to deviate" (par. 1 of bills of lading, inserted between pages 224 and 233 of the record). The right to deviate includes the right to carry goods on deck. *G. W. Sheldon & Co.* v. *Hamburg American Line,* 28 Fed. (2d) 249, 251 (C. C. A. 3).

The Alexandria bills of lading, so called, did not provide for carriage on the ships named therein beyond Port Said. From Port Said on they were not in a true sense bills of lading, but merely contracts of D. C. Pitellos & Co. to effect transshipment. Any person receiving them did so charged with knowledge of these infirmities, patent on their face, including the provision therein that the goods would be transshipped "subject to the conditions and exceptions of the carrying conveyance."

Indeed, the provisions of the Alexandria bills of lading on this subject appear unnecessary. In *The St. Hubert, supra,* the bills of lading issued by the Palawan at Calcutta contained no provision that transshipment would be subject to the terms of the independent auxiliary carrier. Nevertheless the Court held that the clause in the bill of lading of the independent auxiliary carrier, requiring that notice of claim be given before removal of the goods, required the dismissal of the suit.

Petitioner does not assert that there may not be liability on the part of D. C. Pitellos & Co., who was bound by the provisions of the Alexandria bills of lading, and takes no position on that subject.

The decision of the Circuit Court of Appeals is based on two fallacious premises: (1) that the Alexandria bills of lading forbade carriage on deck by an independent auxiliary carrier, even for a minor part of the journey; (2) that the master of the Idefjord was affected with constructive knowledge of the Alexandria bills of lading, the originals of which he never saw, being handed copies, along with a bundle of other documents, as the Idefjord left Port Said (R. pp. 91-92).

It is claimed that the master should have scrutinized what purported to be *copies* of the Alexandria bills of lading, in which event he might at least have had a doubt as to whether he could accept the bales for on-deck shipment. There are many answers to the foregoing. The master was assured on all sides that on-deck carriage had been

agreed to (R. pp. 284, 285, 287). He was entitled to assume that as consent had been obtained from the shippers, the shippers had duly communicated with any other parties interested. The law did not require the master to make an exhaustive legal investigation before the goods were accepted. *Reid* v. *Fargo* and *Nelson* v. *Hudson River R. R. Co., supra,* p. 15.

As was pointed out by Mr. Justice Holmes in *Crossan* v. *N. Y. & New England R. R. Co.* (*supra,* p. 15), if the master's instructions were not clear the law would give him the benefit of a *bona fide* interpretation which he might put upon them and would consider the necessity of an immediate decision.

In the case at bar the suit is solely *in rem* against the ship. The only undertaking on the part of the master was to carry the bales on deck. Antecedent undertakings by other persons not the agents of the ship do not create any right *in rem,* which is a secret lien "*stricti juris*" and not to be extended by "construction, analogy or inference." *Osaka Shosen Kaisha* v. *Pacific Lumber Co.,* 260 U. S. 490, 499; *The Seven Brothers No. 1,* 203 Fed. 21 (C. C. A. 2); *The Owego,* 270 Fed. 967 (C. C. A. 2); *The Saturnus,* 250 Fed. 407 (C. C. A. 2); *The Blandon,* 287 Fed. 722 (D. C., S. D. N. Y.); *The Devona,* 272 Fed. 275 (D. C., E. D. N. Y.).

The Circuit Court of Appeals for the Second Circuit states that *The St. Hubert, supra,* and *Crossan* v. *N. Y. & New England R. Co., supra,* should be "limited to their facts" (R. p. 309). In *The St. Hubert* the goods were shipped by Stanley & Co. to Cooper, Smith & Co. Neither of these parties ever gave any consent to the goods being reshipped at London under a restricted liability. In the case at bar the sales contract between Zariffa and the respondent herein was on a C. & F. basis so that Zariffa was the respondent's agent in making the shipment. The situation is wholly parallel to that in *The St. Hubert, supra,* except that the position of the respondent in the case at bar is weakened by the fact that Zariffa agreed that the goods should be shipped on deck (R. p. 286).

This was not a "harsh, arbitrary" condition as incorrectly said by the Circuit Court of Appeals (R. p. 311), but was, on the contrary, the course deemed best by the respondent's agent and all of the other parties concerned, including D. C. Pitellos & Co., Stapledon & Son and Port Said & Suez Coal Co.

In further discussing the cases and in attempting to distinguish *The St. Hubert, supra,* the Circuit Court of Appeals for the Second Circuit said (R. p. 312): "In none of those cases was the variation one which could work harm upon an innocent third party."

In *The St. Hubert, supra,* the "variation" was a provision in the bill of lading of the independent auxiliary carrier that there should be no liability on its part for any claim, notice of which was not given before the removal of the goods. As the bill of lading of the independent auxiliary carrier was not issued to the consignee of the goods, this provision was unknown to the consignee. Nevertheless, failure to give the notice resulted in dismissal of the suit. In that case the "variation" was one "which could work harm upon an innocent third party."

SECOND POINT

Discussion of cases cited by the Circuit Court of Appeals other than those already commented upon.

The T. A. Goddard (D. C., S. D. N. Y.), 12 Fed. 174, cited R. p. 308. In that case tea was shipped at Foochow, China, on the steamer Orestes, the bill of lading providing for transshipment at Hong Kong on the T. A. Goddard. The tea was loaded on the T. A. Goddard at Hong Kong alongside of some camphor, the odor of which permeated the tea and damaged it. Russell & Co. were the charterers of the T. A. Goddard, and it was claimed by the ship, when sued for damage to the tea, that no recovery could be had because Russell & Co. had sanctioned the stowage. The

ship was held liable on the ground that the master was negligent in stowing the camphor in proximity to the tea and that the concurrence of Russell & Co. was not a defense.

The facts of the case are so different from those in the case at bar that it can hardly be said to be a precedent for either side. But if it may be relied on, it supports the position of the petitioner, the Court saying (p. 181):

> "The libellants, having no direct agreement with the master of the T. A. Goddard, are doubtless limited in their recovery by the lawful terms of the contract between Russell & Co. and the bark, as laid down in the case of the *N. J. St. Nav. Co.* v. *Merchants' Bank,* 6 How. 344."

The above is the position of petitioner in the case at bar.

Bank of California v. *International Mercantile Marine Co.,* 64 Fed. (2d) 97; *The Hibernian,* L. R. [1907] P. 277; *Scrutton on Charter Parties and Bills of Lading,* 14th Ed., 1939, p. 84, cited R. p. 310, hold that the bill of lading issued by the initial carrier may validly incorporate by reference the bill of lading of the independent auxiliary carrier. These decisions lend no support to the conclusion of the Circuit Court of Appeals in the case at bar.

Pacific Rice Mills v. *Westfeldt Bros.,* 31 Fed. (2d) 979, and other cases cited at the bottom of R. p. 310, hold merely that a provision in a contract in handwriting or typewriting is to be preferred to a provision in print, if the provisions are inconsistent. However, it is equally well settled that a provision in typewriting or handwriting does not supersede a provision in print unless inconsistency in fact exists.

The Delaware, 14 Wall. 579; *St. Johns, N. F. Shipping Corp.* v. *S. A. Companhia, etc.,* 263 U. S. 119; *The Gran Canaria* (D. C., S. D. N. Y.), 16 Fed. 868, and *The Kirkhill,* 99 Fed. 575 (C. C. A. 4), cited R. p. 311, hold, generally, that if the master issues a clean bill of lading, the goods cannot lawfully be carried on the ship's deck. In the case

at bar the goods were accepted by the Idefjord under the stipulation that they were to be carried on the ship's deck, and the master of the Idefjord did not issue any clean bill of lading (*supra*, p. 3). The decisions referred to are consequently not in point.

Hansson v. *Hamel & Horley*, L. R. [1922] 2 A.C. 36, and *Harper* v. *Hochstim*, 278 Fed. 102, cited R. p. 312, are cases relating to the sales of goods, and seem to have no bearing on the carrier's liability.

In *The Sprott* (D. C., S. D. N. Y.), 70 Fed. 37, cited by the Circuit Court of Appeals, R. p. 312, the charterers, acting in the immediate presence of the master and as his amanuenses, signed, as his agents, clean bills of lading for the shipment involved. Later this shipment was stowed on the ship's deck and sustained damage. For obvious reasons the ship was held liable in a suit *in rem;* the fact that *after* the bills of lading referred to had been issued the master signed another so-called general bill of lading in favor of the charterers, who were not the shippers of the goods, which bore an on-deck clause, was obviously immaterial.

The Poznan, (D. C., S. D. N. Y.), 276 Fed. 48, cited by the Circuit Court of Appeals, R. p. 312, does not involve any question of transshipment or on-deck carriage. There the charterer, under a provision of the charter party, signed bills of lading, and it was held that these bills of lading became binding on the ship as soon as the goods were laden on board. No other bills of lading were issued by anyone.

In the case at bar the contract of carriage of the Idefjord was made at Port Said and provided for on-deck carriage. The bills of lading issued at Alexandria did not purport to bind the Idefjord.

THIRD POINT

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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